



1966

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## Recommended Citation

Jon Roger Bauman, *Guidelines on Evidence Concerning Testamentary Capacity*, 20 Sw L.J. 662 (1966)  
<https://scholar.smu.edu/smulr/vol20/iss3/12>

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## Guidelines on Evidence Concerning Testamentary Capacity

On December 28, 1936, Miss Hattie Hewlett executed a holographic will while being cared for at an Austin rest home. The will created a trust for five relatives and their children, with remainder to the University of Texas for scholarships. When Miss Hewlett died in 1960, certain of her relatives contested the will, claiming that testatrix was not of sound mind when she executed the instrument. The trial court permitted the witnesses for the contesting relatives to testify that Miss Hewlett was not mentally capable of understanding the nature of her acts and was of unsound mind. However, the court would not allow a psychiatrist, who had never met or examined Miss Hewlett, to testify on matters advanced by the proponents such as whether Miss Hewlett, when she wrote the will, "had sufficient ability to understand . . . the effects of her acts in making the will" and whether she "was mentally capable and had sufficient mind to understand the effect of her acts in making a will."<sup>1</sup> The will was held invalid. The court of civil appeals affirmed, and the proponents brought error. *Held, reversed and remanded*: The trial court's exclusion of the testimony was harmful error. In will contests testimony relating to the testator's general mental capacity, as opposed to testimony involving legal definitions or conclusions, should be admitted. *Carr v. Radkey*, 393 S.W. 2d 806 (Tex. 1965).

In proving that the testator possessed testamentary capacity when he executed the will, a proponent must bring forth evidence showing that the testator at such time understood the following factors: the business in which he was engaged, the nature and extent of his property, the natural objects of his bounty and their claims upon him, the effect of the instrument he executed, the person or persons to whom he meant to bequeath his property, and the method of distribution.<sup>2</sup>

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<sup>1</sup> See excerpts at *Carr v. Radkey*, 393 S.W.2d 806, 809-10 (Tex. 1965). The complete will is reproduced at 384 S.W.2d 738-39. Curiously, the trial court admitted questions to the psychiatrist using the phrase *sound mind*. Since TEX. PROB. CODE ANN. § 57 (1956) states that a testator must be of sound mind when executing a will it would seem that, with the trial court's reluctance to admit testimony, this would have been excluded also. Nevertheless, the trial court permitted the psychiatrist to testify: "I think she [testatrix] was of unsound mind in my definition of it."

<sup>2</sup> *Oliver v. Williams*, 381 S.W.2d 703 (Tex. Civ. App. 1964); *Gulf Oil Corp. v. Walker*, 288 S.W.2d 173 (Tex. Civ. App. 1956); *Christner v. Mayer*, 123 S.W.2d 715, 720 (Tex. Civ. App. 1938) *error disp. judm. corr.* See generally, ATKINSON, WILLS § 51, at 232-41 (1953) and GARDNER, WILLS § 31, at 87-91 (1916); 61 TEX. JUR. 2d, at 118-19. See also § 57, Texas Probate Code which uses the phrase "sound mind." "Sound mind" and "testamentary capacity" have often been held synonymous—see note 14 *infra* and accompanying text. However, the Texas Supreme Court in *Radkey* held the former to be a description of mental condition instead of a legal definition.

Admissibility of evidence is very troublesome since, although the term testamentary capacity is a legal term encompassing several factual components, for a layman the term itself is not easily distinguishable from these factual elements which compose capacity.

In *Carr v. Radkey* the Texas Supreme Court laid two clear guidelines on evidence concerning testamentary capacity and resolved certain issues in a third area. First, the court recognized the Texas rule that the existence of a sensible holographic will is not conclusive proof that the testator had testamentary capacity when the will was executed. The court has consistently rejected authority from other jurisdictions which would establish such a conclusion as a matter of law.<sup>3</sup> Second, it reaffirmed the Texas rule, also contra to some foreign authority, that an adjudication that an individual is of unsound mind which takes place subsequent to execution of his will, is not admissible in evidence on the question of testamentary capacity at the time of execution of the will.<sup>4</sup>

The court noted that admissibility of opinion testimony in testamentary capacity cases has been in a state of flux and uncertainty. In approaching this murky area, the court addressed itself to the three following levels of analysis: (1) the policy underlying former decisions; (2) the theories used to carry out this policy; and (3) the tests used to apply one of those theories to practice.

The policy governing admission of opinion testimony in testamentary capacity cases is to avoid testimony which might confuse jurors and prejudice their decisions or which is superfluous.<sup>5</sup> Before *Radkey*, Texas courts interpreting this policy had taken both strict and liberal attitudes on admission policy, depending, apparently, on the particular court's faith in jurors' abilities to make intelligent and unbiased decisions. The strict attitude indicated a lack of confidence in the jurors and resulted in striking down testimony even slightly tinged with irrelevancy or confusion.<sup>6</sup> The liberal attitude stressed admission of all relevant testimony.<sup>7</sup>

To enforce either a strict or liberal policy, Texas courts before

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<sup>3</sup> See *Carr v. Radkey*, 393 S.W.2d 806, 814-15 and authorities cited therein.

<sup>4</sup> *Id.* at 815 and authorities cited therein.

<sup>5</sup> 1 McCORMIC & RAY, TEXAS EVIDENCE § 2, at 5 (2d ed. 1956). "[T]he very purpose of the exclusionary rules is to keep from the jury evidence which may prejudice them in their decisions." See *Adamson v. Burtle*, 186 S.W.2d 388 (Tex. Civ. App. 1945) *error ref. w.m.*, citing 7 WIGMORE, EVIDENCE § 1918, at 10 (3d ed. 1940) which argues that the basis for exclusion should be whether the evidence is superfluous, *i.e.*, whether the court or jury does or does not need the evidence.

<sup>6</sup> See Sharpy, *Civil Juries, Their Decline and Eventual Fall*, 11 LOYOLA L. REV. 243 (1962-63) criticizing the jury system.

<sup>7</sup> See Norvell, *Invasion of the Province of the Jury*, 31 TEXAS L. REV. 731 (1953) which suggests that the jury system and jurors are quite capable of making correct decisions.

*Radkey* relied on three theoretical bases. The first two theories,<sup>8</sup> though closely related, on occasion were stated as two separate theories by the courts. Both approaches emphasized that it is the jury's exclusive function to decide the question of whether a testator had testamentary capacity at the time of making his will. Under the first theory, testimony was excluded when it specifically invaded the province of the jury;<sup>9</sup> under the second, when it answered the ultimate issue.<sup>10</sup> Under either theory, if a witness were allowed to express his opinion on testamentary capacity, he would usurp the jury's function.

The third theory appears to have been grounded on a law-fact distinction, *i.e.*, that the judge decides questions of law and the jury decides questions of fact.<sup>11</sup> This theory excluded testimony which forced the witness to concern himself with matters of law because the witness would have to define the law in his own mind and then draw a conclusion upon his possibly erroneous definition. The reasoning was that a witness' guess at a legal definition or conclusion was superfluous and only served to confuse the jury.<sup>12</sup>

In deciding whether to exclude opinion testimony under the law-fact theory, a test drawing a line between law and fact was necessary. Texas courts approached this problem in two ways. Some, relying literally upon the language of the question to the witness, appeared in effect to approve a word-of-art test. Such courts excluded testimony automatically when the phrase "legal capacity" was used.<sup>13</sup> Some courts went a step further, equating the phrases "mental capacity," "competency" and "unsound mind" with legal capacity, thus excluding testimony using any of these terms.<sup>14</sup> The second test, under which

<sup>8</sup> 2 McCORMICK & RAY, *op. cit. supra* note 4, § 1395, at 988, where the authors note that witnesses may not express opinions on any ultimate fact in issue because such testimony would invade the province of the jury. See also *Bell v. Bell*, 248 S.W.2d 978 (Tex. Civ. App. 1952) *error ref. n.r.e.*, which states: "To permit such testimony (on testamentary capacity) invades the province of the jury and authorizes the witness to determine the very issue for the court and jury."

<sup>9</sup> *Brown v. Mitchell*, 88 Tex. 350, 31 S.W. 621, 625 (1895); *Pickering v. Harris*, 23 S.W.2d 316 (Tex. Comm. App. 1930).

<sup>10</sup> *Crawford v. El Paso Sash & Door Co.*, 288 S.W. 169 (Tex. Comm. App. 1926). Note that authorities list the invasion of the province of the jury theory and the ultimate issue theory as "erroneous" theories of exclusion under the opinion rule, 2 McCORMICK & RAY, *op. cit. supra* note 4, § 1395, at 219; and 7 WIGMORE, *op. cit. supra* note 5.

<sup>11</sup> *Haynes v. Taylor*, 35 S.W.2d 104 (Tex. Comm. App. 1931); *City of Nacogdoches v. Wise*, 300 S.W. 949 (Tex. Civ. App. 1927).

<sup>12</sup> *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964); *Brown v. Mitchell*, 88 Tex. 350, 31 S.W. 621 (1895); *Adamson v. Burgle*, 186 S.W.2d 388 (Tex. Civ. App. 1945) *error ref. w.m.*

<sup>13</sup> See Stout, *Some Problems in the Trial of a Will Contest*, 7 BAYLOR L. REV. 121 (1955), suggesting that the courts may have, in effect, applied a word-of-art test to solve the problem of distinguishing law and fact.

<sup>14</sup> *Nowlin v. Trotman*, 348 S.W.2d 169 (Tex. Civ. App. 1961) *error ref. n.r.e.*; *Nass v. Nass*, 149 Tex. 41, 224 S.W.2d 280 (Tex. Civ. App. 1949), *aff'd*, 228 S.W.2d 130 (Tex. 1950).

substance rather than form was controlling, looked at the entirety of the questions. This substantive test made exclusion turn on a distinction between testimony related to legal definitions or conclusions and testimony related to general mental condition.<sup>15</sup> The former was inadmissible because it involved questions of law; while the latter was admissible as concerning fact.

To differentiate between the substantive and word-of-art tests, an example is helpful. If a witness is asked: "Do you think the testator had sufficient capacity to execute a will?" testimony is inadmissible under the substantive test because the witness is forced to define a legal concept. In the same example, under a textbook application of the word-of-art test, the testimony is admissible because none of the prohibited phrases is used. It should be noted that questions asking whether a testator knew the objects of his bounty,<sup>16</sup> knew his relatives,<sup>17</sup> understood the disposition,<sup>18</sup> knew the nature and extent of his property,<sup>19</sup> etc.,<sup>20</sup> have been generally admissible under either test. Only when the testimony more directly approached the issue of testamentary capacity has ambiguity prevailed.

The principal case addressed itself to all three levels of analysis and attempted to give the legal profession guidelines in testamentary capacity cases. The court began its discussion by reviewing the law in this area. The first major case was *Scalf v. Collin County*,<sup>21</sup> which set out a liberal policy of admission in testamentary capacity cases. The court in *Scalf* declared that a witness may state his opinion as to the sanity of a person, regardless of whether the opinion involves the ultimate issue. *Brown v. Mitchell*<sup>22</sup> established the law-fact distinction and overruled prior cases inconsistent with its holding, though not mentioning *Scalf* by name. The dictum-laden *Brown* decision created a dispute as to the proper interpretation of the case. *Pickering v.*

<sup>15</sup> *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964); *Brown v. Mitchell*, 88 Tex. 350, 31 S.W. 621 (1895); *Adamson v. Burtle*, 186 S.W.2d 388 (Tex. Civ. App. 1945) *error ref. w.m.*

<sup>16</sup> *Garrison v. Blanton*, 48 Tex. 299 (1877); *Bartel's Estate*, 164 S.W. 859 (Tex. Civ. App. 1914) *error ref.*

<sup>17</sup> *Green v. Dickson*, 208 S.W.2d 119 (Tex. Civ. App. 1948) *error ref. n.r.e.*

<sup>18</sup> *Barton v. Bailey*, 202 S.W.2d 277 (Tex. Civ. App. 1947) *error ref. n.r.e.*

<sup>19</sup> *Nowlin v. Trotman*, 348 S.W.2d 169 (Tex. Civ. App. 1961) *error ref. n.r.e.*

<sup>20</sup> See *Hamlin v. Bryant*, 399 S.W.2d 572, 575 (Tex. Civ. App. 1966) listing many acceptable questions. See also GILBERT, TEXAS ESTATES MANUAL § 21.08, at 251 (1963); ATKINSON, WILLS § 51, at 232 (2d ed. 1953), discussing further questions which would probably be acceptable in Texas. *But cf.* *Pickering v. Harris*, 23 S.W.2d 316 (Tex. Comm. App. 1930), stating that breaking down the elements of testamentary capacity into any of the above noted questions is merely asking the issue of testamentary capacity indirectly. *Radkey* has apparently overruled *Pickering* in all aspects; see note 23 *infra* and accompanying text.

<sup>21</sup> 80 Tex. 514 (1891).

<sup>22</sup> 88 Tex. 350, 31 S.W. 621 (1895).

*Harris*<sup>23</sup> held that *Brown* had definitely overruled *Scalf*, the court also setting out a strict policy against admission. *Pickering* was a commission of appeals case, and later Texas cases continued to take two lines, some following *Pickering*<sup>24</sup> and others following a more liberal approach.<sup>25</sup> *Radkey*, by overruling *Pickering*, put the issue to rest, supporting a liberal policy of admission by stating: "[T]he jury in cases such as these should be given all relevant and competent testimony with regard to the mental condition of the testatrix; and in our opinion, competent evidence about her mental condition and mental ability or lack of it . . . should be admitted."<sup>26</sup> The court justified its less restrictive policy on grounds that jurors have the mentality and capacity to avoid bowing "too readily to the opinions of an expert or otherwise influential witness."<sup>27</sup>

The opinion then considered the argument that the province of the jury can be invaded by witnesses testimony, noting that legal writers have criticized such a theory for being misleading, unsound, and absurd. The court pointed out that the witness' function is to give any testimony which is helpful to the jury and that the jury should weigh all the evidence for reliability as well as credibility. Discarding the ultimate-issue theory, the court said, "there are many occasions on which a witness may be asked the same question the jury must answer."<sup>28</sup> It then affirmed the law-fact distinction as the proper theory to be applied, stating that testimony should be excluded from jury consideration only when it forces a witness to delve into matters of law.<sup>29</sup>

The test applied by the court to distinguish between law and fact is: if the testimony involves a legal definition or conclusion, it is properly excluded; and if the testimony relates to testator's mental condition, it is admissible. By using this test, the court elected the substantive over the word-of-art approach, although even under the test, most likely the phrase "legal capacity" is still a word-of-art causing exclusion. The court, having approved questions using the phrases "sound mind" and "mental capacity," evidently intends that these phrases are not equated with legal capacity.

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<sup>23</sup> 23 S.W.2d 316 (Tex. Comm. App. 1930).

<sup>24</sup> *Bryant v. Hamlin*, 373 S.W.2d 837 (Tex. 1963); *In re Estate of Northcutt*, 340 S.W.2d 510 (Tex. Civ. App. 1960) *error ref. n.r.e.*; *Boll v. Boll*, 248 S.W.2d 978 (Tex. 1952) *error ref. n.r.e.*

<sup>25</sup> *Adamson v. Burtle*, 186 S.W.2d 388 (Tex. Civ. App. 1945) *error ref. w.m.*

<sup>26</sup> *Carr v. Radkey*, 393 S.W.2d 806, 813 (Tex. 1965).

<sup>27</sup> *Id.* at 812.

<sup>28</sup> *Ibid.* The court cited *Federal Underwriters Exch. v. Cost*, 132 Tex. 299, 123 S.W.2d 332 (1938) and also noted that some authorities would permit questions on the ultimate issue.

<sup>29</sup> 393 S.W.2d at 813.